Supreme Court, U.S.
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No. 98-780

In The

Supreme Court of the United States

October Term, 1998

DR. MARJORIE C. McMILLAN,

Petitioner,

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS; DR. GUS THORNTON AND DR. PAUL GAMBARDELLA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONER

DAHLIA C. RUDAVSKY*
MESSING & RUDAVSKY, P.C.
44 School Street, Suite 1000
Boston, MA 02108
(617) 742-0004

STEPHEN VOLTZ
NATHAN & VOLTZ
1000 Franklin Village Drive
Franklin, MA 02038
(508) 520-9000

**Counsel of Record*

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE COURT OF APPEALS RECOGNIZED ITS LIMITED ROLE IN REVIEWING THE PUNITIVE DAMAGES AWARDED BY THE JURY .. 2

II. RESPONDENTS' ASSERTIONS THAT THE FIRST CIRCUIT RULED APPROPRIATELY UNDER F.R.CIV.P. RULE 50 CANNOT STAND IN LIGHT OF RESPONDENTS' FAILURE TO MOVE FOR A DIRECTED VERDICT ON PUNITIVE DAMAGES OR ON EMPLOYER BENEFITS 5

III. PETITIONER DID NOT WAIVE HER SEVENTH AMENDMENT ARGUMENT BY FAILING TO RAISE IT IN HER PETITION FOR REHEARING 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Courtney v. Safelite Glass Corp., 811 F. Supp. 1466 (D. Kan. 1992) 6

Neely v. Eby Construction Co., 386 U.S. 317 (1967) 5

O'Connor v. Huard, 117 F.3d 12 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 691 (1998) 6

Robles-Vazquez v. Garcia, 110 F.3d 204 (1st Cir. 1997) 6

Simon v. Navon, 71 F.3d 9 (1st Cir. 1995) 6, 7

CONSTITUTIONAL AMENDMENTS

U.S. Const. Amend. VII 1, 2, 5, 8, 9

STATUTES

F.R.A.P. Rule 40 8

F.R.Civ.P. Rule 50 ..... 1, 2, 5, 6, 7

F.R.Civ.P. Rule 59 ..... 1, 2, 3, 4, 8

ARGUMENT

What is most notable about respondents' brief opposing petitioner's petition for a writ of certiorari, is that respondents do not contest the central premise of petitioner's argument: that the Seventh Amendment to the United States Constitution bars an appellate court from voiding a punitive damages award that was challenged for the first time after the jury rendered its verdict. It appears therefore that even respondents concede that the underlying Seventh Amendment issue in this case warrants a grant of certiorari.

Furthermore, respondents agree with petitioner that the court of appeals in this case never conducted a review for excessiveness of the size of the punitive damages verdict. Nor do respondents dispute petitioner's assertion that the court of appeals could only properly have ordered judgment for respondents on punitive damages under the rubric of a motion for judgment as a matter of law under F.R.Civ.P. Rule 50.

Rather, respondents oppose the petition on purely procedural grounds, asserting that

a) the court of appeals did not make its ruling pursuant to F.R.Civ.P. Rule 59, but instead, "implicitly" made its ruling under F.R.Civ.P. Rule 50, and therefore acted within its authority in vacating the district court's award of punitive damages to petitioner and in instructing the district court to enter judgment for respondents on the matter of punitive damages;

b) petitioner failed to appeal the appellate court's "reversing the trial court's finding

on waiver" (*i.e.*, the district court's ruling that it could not consider judgment on punitive damages as a matter of law under F.R.Civ.P. Rule 50(b) because respondents had failed to move for a directed verdict under F.R.Civ.P. Rule 50(a)); and that petitioner's failure to make such an appeal precludes this Court from considering it; and

c) in any case, petitioner waived her Seventh Amendment argument by failing to raise it in the court of appeals in her motion for rehearing.

All of these arguments lack merit.

I. THE COURT OF APPEALS RECOGNIZED ITS LIMITED ROLE IN REVIEWING THE PUNITIVE DAMAGES AWARDED BY THE JURY

In arguing that the court of appeals did not decide the punitive damages issue under Rule 59, respondents rely heavily on a fundamentally mistaken reading of the appellate court's decision. Respondents contend that the court of appeals could not have been analyzing the punitive damages issue for excessiveness under Rule 59, because that court did not find that the trial court had abused its discretion with respect to punitive damages. This is telling, respondents contend, because unlike Rule 50 motions, Rule 59 motions are reviewed on appeal under an abuse of discretion standard. At page 3 of their opposition, respondents plainly state:

> The First Circuit did not find that the trial court abused its discretion.

Brief in opposition at 3. Similarly, at page 12, respondents state:

> The First Circuit did *not* analyze whether or not the verdict was excessive [and] did *not* find that the trial court abused its discretion. . . .

Brief in opposition at 12 (emphasis by respondents).

In fact however, contrary to the statements in respondents' brief, the First Circuit expressly held both that the trial court had abused its discretion *and* that the punitive damages award was excessive. At the end of its discussion of the punitive damages issue, the First Circuit stated its holding quite clearly, concluding:

> We therefore hold that the district court abused its discretion in upholding the award of punitive damages, and that the award of punitive damages in this case constitutes a grossly excessive award of damages that shocks the conscience.

Appendix to Petition for Certiorari, 33a (footnote omitted).

Respondents' argument that the court of appeals was not analyzing the punitive damages issue as an appeal of the trial court's Rule 59 ruling is therefore quite mistaken. Indeed, the fact that, contrary to the respondents' characterization of the court of appeals' decision, that court expressly invoked the abuse of discretion standard, and the fact that it also held that the punitive damages awarded by the jury were "excessive" and "shock[ing to] the conscience" make clear that the court was well aware that it was conducting a Rule 59 review, since abuse of

discretion, excessiveness and "shocking to the conscience" analyses are applicable only in reviewing a trial court's decision on a motion brought under Rule 59.

Were there still any question on this point however, that question could be answered by referring to the court of appeals' unequivocal language in the introduction to the punitive damages section of its opinion, in which the court unmistakably acknowledged the strict limitations on its appellate role in reviewing the punitive damages awarded by the jury. In introducing its analysis of the punitive damages issue, the First Circuit wrote:

> In reviewing an award of punitive damages, our role is to determine *whether the district court abused its discretion* in determining that the jury's award of punitive damages was within the confines of state law and that defendants are not entitled to a new trial or remittitur. Although juries have wide discretion in determining the amount of punitive damages, and the trial court has broad discretion to affirm the jury's award of damages, *appeals courts should reduce or set aside awards that are "grossly excessive" or "shocking to the conscience."*

Appendix to Petition for a Writ of Certiorari, 31a (emphasis added).

It could not be clearer that the court of appeals properly understood its role: to review the jury's punitive damages award for excessiveness under an abuse of discretion standard. The First Circuit's error resulted from the fact that while the court repeatedly paid lip service to its strictly limited role in reviewing the punitive damages awarded below, it in fact went well beyond that limited

role and unconstitutionally ordered a remittitur of the punitive damages to zero, in clear violation of the Seventh Amendment. It is that violation of the Seventh Amendment, occurring for the first time in the Court of Appeals, that can only be remedied by this Court and is the reason for this petition.

II. RESPONDENTS' ASSERTIONS THAT THE FIRST CIRCUIT RULED APPROPRIATELY UNDER F.R.CIV.P. RULE 50 CANNOT STAND IN LIGHT OF RESPONDENTS' FAILURE TO MOVE FOR A DIRECTED VERDICT ON PUNITIVE DAMAGES OR ON EMPLOYMENT BENEFITS

Respondents' entire argument proceeds from mistaken premises that the First Circuit somehow "implicitly" overruled the trial court's decision rejecting their Rule 50(b) motion for judgment as a matter of law; that the appellate court had the power to do so; and that, even if the appellate court overreached, petitioner failed to preserve her argument or raise it in her petition for certiorari.

However, respondents' claims founder on a simple fact that respondents do not contest: respondents failed to challenge the district court's submission to the jury of the issues of punitive damages and employment benefits in their motion for a directed verdict under Rule 50(a). This failure is fatal to their argument. *See Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967) (an appellate court may not order judgment n.o.v. under Rule 50(b) where the verdict loser has failed strictly to comply with the Rule's procedural requirements). The First Circuit has followed the teaching of *Neely* closely, as it must, and has

consistently refused to review district courts' denials of motions for judgment as a matter of law under Rule 50(b) where the moving party failed to raise the issue in question previously in a motion for a directed verdict under Rule 50(a). *See, e.g., O'Connor v. Huard,* 117 F.3d 12, 17 (1st Cir. 1997), *cert. denied,* ___ U.S. ___, 188 S.Ct. 691 (1998) ("A party may not raise a ground for judgment notwithstanding the verdict that was not previously presented to the trial court in a motion for a directed verdict." (citations omitted)); *Simon v. Navon,* 71 F.3d 9, 13 (1st Cir. 1995) (same, noting that "[o]nce abandoned, a claim for judgment as a matter of law may not be reviewed on appeal except upon a showing of plain error resulting in a manifest miscarriage of justice"); *Robles-Vazquez v. Garcia,* 110 F.3d 204, 206 (1st Cir. 1997) (same). *See also Courtney v. Safelite Glass Corp.,* 811 F. Supp. 1466, 1470 (D. Kan. 1992) (refusing to grant judgment as a matter of law on damages issues where moving party failed to raise the issues with particularity in its Rule 50(a) motion, before the case went to the jury). Respondents do not even attempt to explain why they should have been exempted from this uniformly-enforced rule.

It is also uncontested that the district court denied respondents' post-verdict Rule 50(b) motion for judgment as a matter of law on these issues precisely because of respondents' failure to raise them in the prerequisite Rule 50(a) motion for a directed verdict. Appendix to Petition for a Writ of Certiorari, 53a. Furthermore, although respondents claim to have challenged that ruling of the district court on appeal, they can point to no language in their appellate brief which genuinely raises the issue. This is so even though respondents faced an extremely

steep burden in attempting to revive their fatally-flawed motion: they would have had to demonstrate "plain error resulting in a manifest miscarriage of justice." *Simon v. Navon, supra.* Nothing approaching the sort of argument that would have had to have been made appears in the portions of respondents' appellate brief dealing with the damages issues in question. Indeed, the concept that the district court committed plain error in denying the Rule 50(b) motion is never mentioned. *See* Appendix to Brief in Opposition at 8a-10a. Again, respondents fail to explain this lacuna in their argument.

Finally, the decision of the court of appeals may be searched in vain for any discussion of whether the district court's decision constituted plain error resulting in a manifest miscarriage of justice, sufficient to warrant setting aside the general rule that judgment will not be granted a party as a matter of law who has failed to move for a directed verdict. That issue simply never came up because it was never raised on appeal. *See* Appendix to Petition for a Writ of Certiorari at 31a-33a. Respondents' assertion to the contrary is nothing more than wishful thinking.

In light of respondents' utter failure, both in the district court and the court of appeals, to act to preserve their challenge to the punitive damages award for lack of evidence, it is ironic indeed that they accuse petitioner of failing to raise in the instant petition the court of appeals' alleged "reversal" of the district court's ruling denying their Rule 50(b) motion for procedural inadequacy. Petitioner had no obligation to challenge a "reversal" that did not occur. Petitioner properly identified the error in the First Circuit's decision, which is the core of the instant petition: namely, the court of appeals' unconstitutionally

transgressing the boundaries that the court itself articulated as limiting its role on appeal under Rule 59.

III. PETITIONER DID NOT WAIVE HER SEVENTH AMENDMENT ARGUMENT BY FAILING TO RAISE IT IN HER PETITION FOR REHEARING

Obviously, petitioner could not argue in her brief in chief on appeal that the court of appeals violated the Seventh Amendment, since that issue only arose once the appellate court had issued its decision. Respondents nevertheless argue that because petitioner filed a petition for rehearing, and did not raise in that motion the Seventh Amendment issue that she has raised in her petition for a writ of certiorari, that she is barred from doing so now.

This argument must also fail. Respondents cite no authority for the proposition that making an argument via a F.R.A.P. Rule 40 petition for rehearing is a prerequisite for filing a petition for a writ of certiorari. Nor do they cite any authority for the proposition that a party's making other arguments in a motion for rehearing bars a certiorari petition raising constitutional claims that could have been, but were not, made via a petition for rehearing. In the absence of any authority holding that petitioner's constitutional claim is barred, this Court should consider petitioner's arguments on the merits, and not deem them waived.

Petitioner has raised an important issue regarding an appellate court's encroachment on litigants' rights to a jury trial. Only this Court can correct the court of appeals' constitutional error. Respondents' groundless

procedural cavils should not deter this Court from examining the important Seventh Amendment principles here at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAHLIA C. RUDAVSKY
(Counsel of Record)
MESSING & RUDAVSKY, P.C.
44 School Street, Suite 1000
Boston, MA 02108
(617) 742-0004

STEPHEN VOLTZ
NATHAN & VOLTZ
1000 Franklin Village Drive
Franklin, MA 02038
(508) 520-9000

Counsel for Petitioner,
Dr. Marjorie C. McMillan